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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/627,867	07/28/2003	Henri Hannula	0365-0568P	3629
2292 7590 04/19/2010 BIRCH STEWART KOLASCH & BIRCH PO BOX 747 FALLS CHURCH, VA 22040-0747				
EXAMINER				
DOWE, KATHERINE MARIE				
ART UNIT		PAPER NUMBER		
3734				
NOTIFICATION DATE		DELIVERY MODE		
04/19/2010		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mailroom@bskb.com

**DETAILED ACTION**

1. The following is in response to the amendment filed April 2, 2010 after the Final Office Action mailed November 13, 2009.
2. Claims 26-49 are currently pending.
3. Applicant's arguments have been fully considered but they are not persuasive.
4. Applicant argues Ferre et al. (US 6,694,167, hereinafter "Ferre") do not teach the limitation, "wherein the frame is configured to contact the subject only on a nose of the subject and is configured to be located only in front of a plane defined by eyes of the subject when the frame is mounted onto the subject". The Applicant contends the center member (34) may not be interpreted as the claimed "frame" since the center member is attached to side members (30), which extend around the forehead to support the center member on the patient. The Examiner respectfully disagrees. Ferre clearly distinguishes the different elements of the entire device, or headset (12). Ferre discloses, "the headset 12 includes two ear mounts 28 on side members 30, and a nose bridge mount 32 on center member 34" (col 4, ll 11-13). Furthermore, Ferre teaches, "the center member 34 may be rotatable with respect to the side members 30" (col 4, ll 23-25). Ferre does not disclose the center member (34) must be integrally formed with the side members (30) to be a single element. Thus, the center member (34) may be interpreted as the claimed "frame". The Examiner notes Applicant has not claimed any structural features that distinguish the frame (34) of Ferre's device from the instant application. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).
5. Furthermore, the Examiner notes the frame (34) is capable of contacting the subject only on a nose of the subject and is capable of being located only in front of a plane defined by eyes

of the subject when the frame is mounted on the subject (Fig 1). The plane may be interpreted as a coronal/frontal plane passing through the eyes and the "front" of the plane is interpreted as the anterior side of the plane. Additionally, the examiner respectfully notes the nasal bones extend up between the eyes.

6. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

7. In response to applicant's argument that Anthony is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Anthony teaches a well known method of supporting or connecting a member to the front of a face using a strap that extends behind the head, thus forming a closed loop. Thus the side members (30) of Ferre, which are interpreted as the supporting elements, may be modified in view of Anthony to comprise a strap that extends around the back of the head to provide more support and ensure the frame (34), or center member, does not slip from the patient's face.

8. Finally, Applicant argues the strap of Anthony cannot improve the Ferre device, since the Ferre device already has supporting members. The examiner acknowledges Ferre teaches supporting members (30). However, this does not preclude one having ordinary skill in the art

to improve upon the supporting members disclosed by Ferre. For example, the improvement may ensure the frame (34) does not slip off of the patient's face, is comfortable, and easily adjustable.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to KATHERINE M. DOWE whose telephone number is (571)272-3201. The examiner can normally be reached on M-F 8:30am - 5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Todd Manahan can be reached on (571) 272-4713. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Katherine Dowe  
April 12, 2010

/K. M. D./  
Examiner, Art Unit 3734